Supporting Brief For Petitioner.

(A-1) The Constitution of Illinois vests the legislative sovereignty over the County affairs of Cook County in "The Board of County Commissioners of Cook County," by a special section of that constitution.

Section 7 of Article 10, Constitution of 1870.

On the contrary however, in the other 101 Counties of the State, the affairs of such County may be transacted in such manner as the General Assembly may provide.

Sections 5 and 6 of Article 10, of Constitution 1870.

(A-2) That sovereign legislative power is co-ordinate with and beyond the jurisdiction of every Court and State's Attorney and the Legislature of Illinois.

Article III, Constitution of Illinois, 1870.

Cummings v. *Smith*, 368 Ill. 94, 103.

Ottawa Gas-Light & Coke Co. v. *People*, 138 Ill. 336, 343.

People v. *Czarnecki*, 265 Ill. 489.

Kreeger v. *Zender*, 332 Ill. 519.

Helliwell v. *Sweitzer*, 278 Ill. 248.

(A-3) This Court will take judicial notice that the population of Cook County is more than four million people and more than half the population of the State of Illinois.

(A-4) By sovereign acts of legislation, which are shown by this record, the County Board of Cook County, expressly authorized the 818 civil tax litigations which were conducted by petitioner Winston, in courts of record in Cook County, and also authorized said contract of employment, which was made with the express approval in writing by John A. Swanson, then State's Attorney of Cook County.

County proceedings at pages and dates herein mention: 4/27/32 page 1207—12/5/32 page 60, 68—12/12/32 page 74 (Tr. 3ff).

Cummings v. *Smith,* 368 Ill. 94, 103.

(A-5) Said contract directs and empowers Winston to perform legal services and administrative action at court. That action every attorney and counseller-at-law is authorized by his license from the Supreme Court of Illinois, to carry on at the request of the client who has control over such litigation. The *preparation and conduct of such litigation at court for Cook County as client,* is not in any sense of the term any act of sovereignty, and does not involve any essential power vested in the State's Attorney of Cook County by the Constitution of Illinois.

Chapter 13, Section 1, Illinois Revised Statutes.

Article 6, Section 22, Constitution of Illinois 1870.

Ottawa Gas Light & Coke Co. v. *People,* 138 Ill. 336, 343 (1891).

Howard v. *Burke,* 248 Ill. 224, 228 (1910).

Wilson v. *County of Marshall,* 257 Ill. App. 220, 223 (1930).

People v. *Straus,* 266 Ill. App. 95 (1932; Affirmed by *People* v. *Straus,* 355 Ill. 640 (1934).

(A-6) The license and franchise held by Winston as an attorney and counsellor at law for more than fifty years, to practice law and thereby to earn a livelihood for himself and family is a vested right which supports his claim for recovery at court.

Nixon v. *Herndon,* 273 U. S. 536 at 540.

Coleman v. *Miller,* 307 U. S. 433 at 469.

(B-1) The Statutes of Illinois *pertaining to revenue* for all taxing bodies (Chapter 120 to Illinois Revised Statutes), specifically confirm the power of *the County Board and no one else* to manage and conduct all litigation *for collection of delinquent taxes* by court proceedings.

Illinois Revised Statutes as amended June 17, 1917, Chapter 120, Sections 230 253, 254, 156 to 161, 183, 255, 292 (See Appendix to this petition at page 39 for an example).

Ottawa Gas Light Co. v. *People*, 138 Ill. 336, 343.

Article III, Constitution of Illinois, 1870.

(B-2) The statute is specific that the *County Board* means "The Board of County Commissioners of Cook County," Chapter 120, Section 292.

(B-3) The County Board has control of many funds that are applicable to payment for legal services under this contract, in addition to penalties and taxes exceeding Sixteen Million Dollars, cash funds collected and paid into the County Treasury by efforts of petitioner.

Section 705, Chapter 120, Ill. Rev. Statutes.

People v. *Kawoleski*, 310 Ill. 498, 501.

Tearney v. *Harding*, 335 Ill. 123 at 128.

(C-1) No tax statutes which name the State's Attorney as an enforcing officer were ever effective as to this case. The "State's Attorney" was named as enforcing officer in the delinquent Tax Act Laws of 1935, page 1168. All suits and acts by Winston were before that date. And that law was expressly repealed by the present Revenue Law approved May 17, 1939. The "State's Attorney" was named as enforcing officer in the delinquent Tax Act dated July 26, 1939, at Section 6, and also in the delinquent Tax Act July 10, 1941, at Section 6, but these laws are limited

to counties with a population *less than* 500,000 *people;* they were never applicable to Cook County.

(C-2) The State's Attorney of Cook County is referred to in the County Assessors Act, Laws of May 15, 1933, Section 46. But prior to enactment of Section 1 of act of July 24, 1943, the State's Attorney of Cook County is not mentioned anywhere in the Revenue Act of Illinois. All suits and acts by Winston were *before* any of these dates.

C. C. & N. Co. v. *Louisiana*, 233 U. S. 362 at 376-378.

(C-3) There was no common law "State's Attorney." There are no common law powers of State's Attorney. The State's Attorney provided for by the Constitution of 1870 of Illinois, was a new office. Constitution does not specify any duties of that office (Tr. 57).

Revised Statutes of Illinois 1845, Chapter 12.

Constitution of Illinois 1870, Article VI, Section 22.

(C-4) Neither the State's Attorney nor any one else has any power whatever to conduct civil litigation about *collection* of delinquent taxes, separate and apart from said specific statutes which vest in the County Board, authority to initiate and conduct all such litigation.

People v. *Biggins*, 96 Ill. 481 (1880).

Ottawa Gas Light Co. v. *People*, 138 Ill. 336, 343 (1891).

Wilson v. County of Marshall, 257 Ill. App. 220, 223 (1930).

People v. *Straus*, 266 Ill. App. (1932); Affirmed by *People* v. *Straus*, 355 Ill. 640 (1934).

(C-5) Only the County Board may authorize the office or employment of an assistant State's Attorney or

Special Attorney. Only the County Board may provide compensation for such office or employment or personal service.

Dalby v. *People*, 124 Ill. 66 at 75.
Section 64 Fortieth, Chapter 34; Ill. Rev. Stat.
Section 18, Chapter 53, Illinois Revised Statutes.
Section 24, Article V, Constitution of Illinois.
People v. *Hanson*, 290 Ill. 370, 373.
Lavin v. *Board of Commissioners*, 245 Ill. 496, 530ff.
Tearney v. *Harding*, 335 Ill. 123, 127.

(D-1 The primary duty is obligatory upon all courts, both state and national, to hear and determine assertions upon the Bill of Rights and other constitutional questions and federal questions, which are presented by the record.

Article VI of the Constitution of the United States (Second Paragraph).
West Chicago Street Railway Co. v. *Illinois ex rel. Chicago*, 201 U. S. 506 at 519-520.
Coombes v. *Getz*, 285 U. S. 434.
Coleman v. *Miller*, 307 U. S. 433ff.

D-2) The orders dated September 23rd, 1943, and October 24th, 1934, as adhered to on November 11, 1943, by the Supreme Court of Illinois (tr 79, 159) are now final for purposes of review by this Court.

Georgia Ry. and Power Co. v. *Decatur*, 262 U. S. 432.
Central Union Telephone Company v. *City of Edwardsville*, 269 U. S. 190.
C. C. & N. W. Co. v. *La.*, 233 U. S., 362 at 372.)

(D) Said orders are void and outlaw because they seek to destroy contract and property rights of your petitioner

(including his license and franchise as attorney and counsellor at law), which are well pleaded and shown by this record to be vested before this suit was begun by Thomas J. Courtney on July 15, 1933.

People ex rel Eitel v. *Lindheimer*, 371 Ill. 367, 308 U. S. 505 and 636.

Home Building & Loan Association v. *Blaisdell*, 290 U. S. 398 at 431.

(E) By decisions of Supreme Court of Illinois, through all the decades prior to the judgment and decree now appealed from, the Constitution and Statutes as to powers of County Board and duties of State's Attorney as to civil litigation, have always sustained the sovereign power and legislative actions of the County Board.

These sovereign acts of legislature have provided for employment of and for payment of County Attorneys, Assistant State's Attorneys' and Special Attorneys, to attend to all manner of litigation authorized by counties in Illinois, independent of any action therein by the State's Attorney of such a County. As a contemporaneous construction, such legislation and administration is binding upon all branches of the government of Illinois.

Cook County Budget for 1931 and prior years.

Ottawa Gas and Light Co. v. *People*, 138 Ill. 33[illegible] 343 (1891).

County of Franklin v. *Layman*, 145 Ill. 138; affirming 43 Ill. App. 163.

Cook County v. *Healy*, 222 Ill. 310, 317ff (1906).

Howard v. *Burke*, 248 Ill. 224 at 228 (1910).

Galpin v. *City of Chicago*, 269 Ill. 27 at 41 (1915).

Tearney v. *Harding*, 335 Ill. 123 at 127 (1929).

People v. *Straus*, 266 Ill. App. (1932); Affirmed by *People* v. *Straus*, 355 Ill. 640 (1934).

(F-1) By contemporaneous construction such legislation and administration is binding in favor of Winston. against all branches of the government of Illinois.

Cook County Budget for 1944 and all prior years.
Nye v. *Foreman,* 215 Ill. 285 at 288 (1905).
Howard v. *Burke,* 248 Ill. 224 at 228 (1910).
Anderson National Bank v. *Luckett,* 64 S. Ct. 599, 651: 321 U. S.

(F-2) And the Legislature of Illinois by Statute in 1912 and re-enactment in 1929 had reaffirmed all that court construction of statute and constitution for years before the Winston contract was made.

Section 18 of Chapter 53 and Section 129 and 179 of Chapter 46, of Illinois Revised Statutes.

(F-3 There is even stronger confirmation and independent continuous assertion by the legislature of Illinois, in its special law for appointments to office by Cook County Commissioners, enacted June 15, 1893 Revised 25, 1913, Chapter 34, Section 64, Fortieth and Forty-third. These laws were re-enacted July 21, 1941 and July 15, 1943, as Sections 64:29 and 52 of Chapter 34 (Smith-Hurd Illinois Annotated Statutes—Pocket part for 1944, page 43.) Continuously since June 15, 1893 this Illinois Statute has provided for "*the county attorney, the county architect,* the committee clerk of the County Board, the county purchasing agent" and other employees to be appointed by the County Board.

(F-4 Without need to rely upon that statute, the Supreme Court of Illinois ordered the County of Cook to pay the County Architect, as an exercise of County power and duty under Section 7 of Article 10 of Constitution of Illinois 1870.

Hall v. *County of Cook,* 359 Ill. 528.

(F-5) It is arbitrary denial of equal protection of law, impairment of contract, a taking of vested property by judicial act *ex post facto* without benefit of purchase by eminent domain, and a denial of due process of law, for the Supreme Court and Circuit Court of Illinois, to rule against petitioner whose position is indistinguishable from that of said County Architect.

ARGUMENT FOR PETITIONER

Summary Statement of Facts and Issues.

In order properly to understand ths case, this Court should be rather fully advised as to the unusual background of facts out of which the case arose.

The County of Cook is the largest single county and local tax-collecting unit in the United States, since it includes not only the City of Chicago, but also considerable area outside that city, and has a population of over 4 million people. In the years 1931 and 1932, the County (for the reasons hereinafter set forth) had actually become insolvent and was unable for many months to pay the court judges and other officials, and was unable to pay its current debts, and even defaulted on the interest on its muncipal bonds. This condition had been brought about by three grave emergencies:

1. The County of Cook and the City of Chicago (like other local governments in the United States) during those years was suffering in their tax revenues from the effects of the great financial depression of that period; and as a result the County (which is the constitutional tax collecting agency for the State and all other local governments within the County, including the City of Chicago) was confronted with a cumulating amount of tax delinquencies both as to real and personal property. These gross delinquencies by the end of the year 1930 had brought the threat of governmental disaster to the County.

2. The Legislature of the State and the State Tax Commission had previously ordered a so-called "Reassessment" of all real estate tax valuations in the

County of Cook for the year 1927; and this "Re-assessment" had itself greatly increased the temporary insolvency of the County (and all local government units within the County, including the City of Chicago), for the reason that the "Re-assessment" had taken more than 18 months longer to complete, than was contemplated or expected by the taxing authorities of the State and County; as a result of which no real estate taxes whatever were collected in the County during the period that such "Re-assessment" was being spread.

3. After this and during the years 1929 to 1932, it was (and is) a matter of common knowledge in Cook County that a so-called "tax strike" existed in the County whereby a large part of the real estate taxpayers completely refused to pay any taxes whatever until forced to do so by suits instituted for collection thereof, and the liquidation process of courts.

The record shows that as a result of these extraordinary tax conditions, the County and all of the local governments within the County (including the City of Chicago) were faced with bankruptcy; that the interest on their municipal bonds had been defaulted with the result that all of such bonds were badly depreciated on the financial markets, and the fiscal credit of the County and of each of such local governments was, for the time being, totally destroyed; while the thousands of municipal employees of the County and the other local governments were unpaid for months on end, and were for long periods of time continuously faced with what came to be known as "payless pay-days."

The record shows that the County Board of Cook County, under a special provision of the Illinois Constitution, is charged with the duty of "managing the affairs" of Cook County (Const. Art. 10, Sec. 7); and that the Statutes of Illinois make it the sole duty of the said County

Board to enforce the collection of all property taxes, both real and personal, by suits in court if necessary.

The record shows that the County Board, being confronted with the severe tax emergency already indicated, decided to correct that situation as rapidly as possible and for that purpose, as already indicated, entered into a formal contract of record with your petitioner for the collection of such delinquent real estate taxes. That contract was fully considered and long debated by the County Board and was finally authorized and adopted by formal legislative action of the County Board, which incorporated the Contract therein.

In view of its prime importance in this case, this sovereign legislative action of the County (including the Contract in question) is set forth (Tr. 3 ff.) as part of State's Attorney's complaint in the trial court.

The record shows that at the time of such legislative action by the County and the making of that Contract, in the year 1931, the general legal adviser of the County of Cook was the then duly elected and acting State's Attorney of the County, the Honorable John A. Swanson (Tr. 8).

The record shows that for a period of more than 60 years prior thereto, and ever since the adoption of the Illinois Constitution of 1870, *down to the inception of this suit, in July,* 1933, it had been the custom and practice and tradition for the County Board of Cook County to secure the aid and assistance of outside counsel and attorneys in the collection of taxes (in addition to the State's Attorney) whenever the County Board determined that such action was in the public interest. That custom and practice had been specifically approved by at least four prior decisions of the Supreme Court of Illinois: See page 36.

Acting under such custom and practice and tradition, the County Board made the Contract in question and the then State's Attorney of Cook County formally approved the legislative action of the County Board in authorizing the said Contract, and officially approved the Contract so made between the County and your petitioner (Tr. 8).

Your petitioner accepted the said Contract and proceeded to set up a large clerical and auditing force to carry out its provisions. In due course of contract period, petitioner instituted in court and pursued more than 818 separate and important real estate tax suits in the courts of the County and actually collected by force of those suits and paid over to the County treasury a total sum of delinquent taxes amounting to $16,522,470.81.

Said federal question is stated more factually as follows:

And whether a State Court of Illinois is forbidden by the Constitution to deny the validity of such a contract of public record, between the County of Cook and Edward M. Winston, who is a resident of Illinois and a duly licensed attorney and counsellor-at-law; the terms of which contract authorize and direct said Winston, Attorney, to conduct and control litigation in said courts for the collection of taxes long delinquent in Cook County; his services to be performed under the supervision and management of the Board of Commissioners of said Cook County; the making of which contract of public record was requested and approved in writing at the time of its signing, by the State's Attorney of Cook County then in office.

And whether the State Court in Illinois in denying the validity of such contract, may disregard and overrule its own prior decisions, and may disregard the history and practice as to administration of such matters, and may

repudiate accountings for his fees and outlays made in good faith between said County and Winston, Attorney, and whether said court by downright fiat may refuse compensation to said Winston, Attorney, for his proper services performed and completed, and may refuse to reimburse him for outlays in pursuance of said contract of public record, all of which performance of contract occurred before a later State's Attorney, who is now in office, and relying upon his own official authority, is seeking by this injunction suit to stay further performance under said contract with said County of Cook, by denying compensation to Winston, Attorney, for services rendered in good faith before such adverse intervention; the legal services so completed by Winston having produced substantial returns of tax money (384 Ill. at page 295) to the treasury of said County of Cook and State of Illinois, during the severe financial distress which came to Municipal Corporations in Cook County during the 1930 years of depression.

Your petitioner particularly calls attention to the fact that the County of Cook, under the law, received (as compensation for its services and efforts of tax collection) all the so-called "penalties" collected from taxpayers, being additional sums due after default, which these suits conducted by Winston collected, over and above the taxes originally assessed. And your Petitioner also calls particular attention to the fact that his fees and compensation, under his contract, were not to be paid out of the general funds of the County, but depended entirely on and were to be paid out of such "penalties" as might be collected by him. In other words, the County itself was to make, and did make, a large profit out of the services of your petitioner; and your petitioner's fees were to be paid as a relatively small part of such profit to the County.

Section 705, Chapter 120, Ill. Rev. Stats.

The record in this case shows that the books and records of the County Treasurer showed (and still show) that your petitioner actually collected the sum of $3,546,443.70 as "penalties" on delinquent taxes, all of which sum went into the County treasury *as profit* to the County, as a result of the contract with your petitioner.

New State's Attorney.

The record shows that in November, 1932, and about 18 months after your petitioner began work under the said contract, a new and different State's Attorney was elected in Cook County, and that he was of a different political party from his predecessor. And your petitioner charges that the record in this case shows that this case has grown entirely out of that change in the personnel of the office of State's Attorney of Cook County. The same State's Attorney who was elected in November, 1932, is still in office at the time of the filing of this Petition. That State's Attorney, in his own behalf and *in his own name*, began this suit in July, 1933, to have your petitioner's contract with the County declared void and of no avail and to restrain and prevent any payments whatever being made to petitioner under such contract.

All services by petitioner were performed and completed before this suit was led. (See above page 5.)

During said domination by the new State's Attorney the delinquences have grown and now "there are hundreds of millions of dollars of delinquent taxes against property in Cook County." *People* v. *Courtney*, 380 Ill. 171 at 180.

Your petitioner urges that the Supreme Court of Illinois has denied to your petitioner his constitutional rights, as stated elsewhere in this petition. And your petitioner

contends that the Supreme Court of Illinois has decided this case adversely and contrary to several of the prior and settled decisions of that court itself (as already stated) upon which earlier decisions your petitioner properly relied and the County Board properly relied, in entering into the said contract; and that thereby your petitioner became vested with certain contract rights and property rights in and to the said contract and its avails. And your petitioner therefore says that the Supreme Court of Illinois has illegally and arbitrarily changed its own well-settled construction of the Constitution of Illinois, and of applicable Statutes of Illinois in the premises; and that the said Court has illegally and arbitrarily applied its new ruling in an *ex post facto* and lawless fashion in an attempt by the Court to destroy the vested rights of your petitioner.

Contract rights vested in petitioner under important Illinois Cases which had established settled law of property.

These are cases upon which petitioner and Cook County relied in making contract in suit. They had established a settled rule of property rights in Illinois for 60 years before the contract in suit was made.

Ottawa Gas Light & Coke Co. v. *People*, 138 Ill. 334 (1891).

This was a tax suit against the Gas Company by the County of La Salle to collect delinquent personal property taxes. The declaration was signed "M. T. Maloney, County Attorney." A motion was interposed in the trial—

> "To dismiss the suit because it had been started without authority of law and by an attorney not authorized by law to bring or prosecute the same."

The motion was suported by two affidavits; the first, by one of defendant's counsel, setting out that Maloney was not the State's Attorney of the County and that the records

of the court failed to disclose "any appointment of Maloney to prosecute the case." There was also the supporting affidavit of the State's Attorney of the County, setting up that

> "He (the State's Attorney) had neither been requested to prosecute the suit nor had he been sick, absent, or unable to attend the same, nor was he interested in the subject matter of the suit; that the suit was for recovery of a debt due the State of Illinois and La Salle County; but the State's Attorney (in the absence of the disabilities referred to) was alone authorized to prosecute; and that Maloney had no legal authority to institute or prosecute the suit."

There was a counter-affidavit by Maloney, setting up

> "That he had been, by resolution of the Board of Supervisors of the County, authorized and directed to begin and prosecute the suit."

The trial court denied the motion to dismiss. A general demurrer was then interposed by the County to the declaration and the demurrer was overruled. Trial was had and judgment entered against the County for $2,597.00 and costs. On appeal the judgment was reversed by the Supreme Court on the ground of improper admission of evidence; but the Supreme Court specifically held that Maloney could act as counsel for the County in the further prosecution of the case. In so holding, the Supreme Court said:

> "It was not error to overrule the motion to dismiss the suit. The attorney who instituted the suit, it was shown, was in that regard acting by the direction and under the authority of the County Board; and the authority of the County Board to institute and prosecute suits for delinquent taxes, whether due upon delinquent lands or personal property, is amply given in Section 230 of the Revenue Law. (See page 39 below.)
>
> "It is contended, however, that while the authority

> of the County Board to cause the institution of suits for unpaid taxes is ample, it is not at liberty to select counsel but must act by and through the State's Attorney of the county.' [Citing Chap. 14, Sects. 5 and 6 concerning the powers of the State's Attorney, and discussing them the Court continues:]"It would be perfectly competent for the County Board to direct the State's Attorney to recover delinquent and unpaid taxes and to prosecute the same and in such case it would be his manifest duty to act. * * * We are not disposed, however, to hold that the County Board is, by the statute defining the duties of the State's Attorney, denied the power and authority to select and empower any *competent attorney* to represent the People in beginning and prosecuting suits to recover delinquent taxes." (See Statutes at page 52 below.)

Here we have a specific ruling by the Supreme Court in strong language, refusing the major contention of opposing counsel. The Supreme Court, in conclusion, on this point says:

> "We have no doubt that under the general power of the County Board as the fiscal agent of the County it has the inherent right to direct the course of the proceeding [in suits to collect taxes] and to select the persons and agencies through which it will act."

Another important case which is squarely in point is *County of Franklin* v. *Layman*, 145 Illinois, 138 (1893) Affirming 43 Ill. App. 163; also 34 Ill. App. 606).

This case likewise is so important that it deserves a full analysis. The case was twice before the Appellate Court and was twice tried by the trial court before a jury. The suit was brought by certain attorneys against the county to recover for legal services furnished the county under a special contract. At the end of the first trial a verdict was returned for plaintiffs and judgment entered for $5367.76.

This judgment was reversed in 34 Ill. App. 606, because of improper instructions given to the jury. On a second trial there was again a verdict for the plaintiffs for the same amount, upon which judgment was entered. The second judgment was affirmed in 43 Ill. App. 163. The Supreme Court, in the case here under discussion, affirmed the Appellate Court on the second appeal.

It appears that prior to 1880 Franklin County had issued $149,000 of its bonds in aid of a railroad company, $100,000 of its bonds being based on one Enabling Act of the Legislature, and $49,000 being based on a different Enabling Act. Some years later questions arose as to the validity of the bonds and the County determined to test their validity in the courts. In pursuance of that determination, the County Board made the special contract and employed the attorneys in the case. By the terms of the contract, the attorneys were

> "To commence proper suits and prosecute the same to final determination * * * for a retainer of $250 and the additional sum of $8,000 if and when the litigation was finally determined in favor of the County."

Thereupon there ensued several years of litigation as a result of which the County was successful, first, in defeating the $49,000 issue of bonds, and later in defeating the $100,000 issue. At the time of this trial the County had already paid the attorneys for their proportional amount of fees based on the $49,000 bond issue. After the $100,000 bond issue had likewise been held invalid the County refused to pay the balance of fees for that service and the suit was brought to recover that proportionate amount of fees. As already stated, the trial court, the Appellate Court, and the Supreme Court, all held that the attorneys were entitled to recover.

In its opinion the Supreme Court said, among other things:

> "It is next objected that the County could not lawfully enter into a contract to pay attorney's fees (under the facts of the case) * * * It is broadly conceded that the County had the right to test the validity of its doubtful obligations. But it is said that by the statute [Chap. 34, Sec. 33, concerning the duties of the County Board respecting suits, etc.] the power of the County Board is limited in its employment of counsel to prosecute suits in which the County is a party. We are not disposed to give this section the construction contended for it. * * *
>
> "The County Board is authorized to carry into effect the powers of the County (Chap. 34, Sec. 33) among which is to make all contracts and to do all other acts in relation to the property and concerns of the County necessary in the exercise of its corporate powers. * * *
>
> "We are of the opinion that such proceedings (as the litigation in the case) were within the spirit of the statute and that the *County Board had authority to enter into the said contract.*"

Here again we have a specific holding of the Supreme Court that the State's Attorney is not the exclusive attorney for a county board in civil proceedings; but that where the county board determines it is necessary and desirable so to do, the county may employ outside counsel.

Another interesting case is

Wilson v. *County of Marshall,* 257 Ill. App. 220 (1930).

In that case the opinion holds that the County Board had power to make a special contract for outside attorneys, even though the State's Attorney had been available and had not been consulted. Justice Jones cites and

relies on the cases of *County of Franklin* v. *Layman* and *Ottawa Gaslight Company* v. *The People*, which we have discussed above in detail.

Another important case, which arose in Cook County, is *People* v. *Straus*, 266 Ill. App. 95; 355 Ill. 640.

(That case in part litigated the very same contract now sued upon by Winstont: See above 5 and Tr. 8).

That was a tax foreclosure suit in the Superior Court where there had been an interlocutory order appointing a receiver of a large apartment hotel. The bill of complaint had been filed in the name of the People and was signed and sworn to by "Henry M. Ashton, their Attorney and Solicitor." Ashton had been appointed attorney for the County Board by a resolution of that Board. The resolution is set out in the opinion. It refers to the nonpayment of taxes in the county over a period of years, and the Court takes notice of the recital of the resolution that there had been a vast accumulation of unpaid taxes, "thus creating an emergency situation with reference to the revenue."

It was contended by the defendant that

> "As Ashton was neither the State's Attorney nor the Attorney General * * * he had no right or authority to represent the People in the present suit and the resolution of the Board * * * employing him for the purpose therein stated was ultra vires *and void.*"

The opinion in the case is by Judge Gridley and is full and exhaustive. The opinion particularly refers to the case of *Abbott* v. *County of Adams*, 214 Ill. App. 201, cited and relied on by counsel for respondents in the case at Bar, and says that that opinion "has been overruled." Judge

Gridley, in his opinion, refers to an opinion of the Attorney General (Attorney General's Opinion, 1928, page 240), holding that a County Board had legal authority to employ outside counsel in proceedings for the collection of delinquent taxes. The Attorney General's opinion is discussed at length thereafter. Judge Gridley's opinion concludes on this point:

> "In view of the statutes above quoted, the holding in the *Ottawa Gaslight* Case and the resolution of the Board of Commissioners of Cook County, we are of the opinion that the contention of appellants' counsel (that the State's Attorney was the sole lawful counsel of the Board in such matters) is without substantial merit."

The Appellate Court reversed the case, only on the ground that the appointment of a receiver to take charge of and manage the property during foreclosure of the tax lien was illegal.

The case went back for trial on the merits and a decree of foreclosure was entered. The plaintiff later went direct to the Supreme Court and that case is the one now to be discussed.

People v. *Straus,* 355 Ill. 640 (1934).

This was a writ of error from a decree of foreclosure of a tax lien in which there had been a decree for $165,683.99 of back taxes and a sale to the County. In the Supreme Court the County was represented by the State's Attorney, but another law firm had been substituted as associate counsel for the solicitor who had appeared for the County at the trial. In the Supreme Court the defendant again raised the objection that the trial in the County Court had been "improper" because the County had been represented by other counsel than the State's

Attorney. The Supreme Court affirmed the decree below and denied the last mentioned contention, saying on this point:

> "Numerous cases are cited tending to show that it was the proper function of the State's Attorney to prosecute the case, and there is much argument for the purpose of showing that the contract between the County Commissioners and the solicitor who appeared for the People in the trial court was contrary to public policy and void. The particular case relied on in this conection is *Fergus* v. *Russel*, 270 Ill. 304. That case is not in point here because the employment was directly attacked there and not brought collaterally, as is attempted here. In *Mix* v. *People*, 116 Ill. 265, we used the following language:
>
> " 'The collection of the public revenue is of the utmost importance and no court should allow a suit of this character to be dismissed because the solicitor who brings it may not happen to be the State's Attorney or the Attorney General. * * * There is no statute requiring a bill of this kind to be signed in the official character of either of those officers, as there is with reference to an indictment.'
>
> "It sufficiently appears that the Board of Commissioners of Cook County authorized the commencement of this suit in the name of the People and that the People ratified the action through a purchase at the foreclosure sale. Having thus authorized, approved and ratified everything that was done, it makes no difference to plaintiff in error whether or not said solicitor was duly authorized to bring this suit."

Here again we have the Supreme Court making two significant and important distinctions with respect to the liability of the County in such cases as that now at Bar. In both cases the Supreme Court held that there was a difference between a direct attack on the right of the County Board to enter into a contract for employment of

an attorney (and architect) and a case where a "collateral attack" was made after the employment had been effected and the work was done. In both cases the Supreme Court also held that where the party has accepted the benefit of the contract and the services rendered have been just and profitable to the County, it is then too late to raise even technical objections to the manner in which the contract for the employment has been made. This is an important point in the case at Bar, since it is admitted here that the contract in this case was very profitable to the County and the County was paying for the services out of extra "penalties" which were collected as a result of the tax suits started by the plaintiff as the County attorney.

In this *Straus* case Courtney had defended the right of Ashton to represent the County Board of Cook County.

Hall v. *Cook County,* 359 Ill. 528 (1935).

In our comment about the *Straus* case in the Superior Court, we referred to the case of *Hall* v. *Cook County.* The *Straus* case and the *Hall* case both establish the rule of law that the County is in a weaker position in contending that a contract for the employment of services of a professional character is invalid after the contract has been carried out and the County has received the benefit of it, than when a taxpayer's bill is filed to prevent the carrying out of the contract in advance of its execution. The *Hall* case is well known and need hardly be summarized here. The late Mr. Erich Hall, who was County Architect, recovered a judgment for $137,000 for architect's fees for services rendered in drawing plans for the defunct "Cook County Auditorium" which the County had planned to build and then abandoned. There, as here, the State's Attorney had objected to a recovery because,

as it was contended, the County had no right to make the contract, and furthermore, had not made a prior appropriation for it. In rejecting the County's contention on this point, the Supreme Court said in the *Hall* case:

> "The powers of the County are two-fold, viz.: its governmental powers and its business powers. Ordinarily, an estoppel or a waiver cannot be pleaded against a county for its failure to exercise its governmental powers, or the exercise of its governmental powers in an improper manner. This rule is not always true in the exercise of the municipality's business powers. In the cases cited by defendant * * * the assault was made by some taxpayer. * * * The same rule of strict construction should not be applied in behalf of a county where it attempts to take advantage of its own failure properly to exercise its business functions as is involved in behalf of the taxpayer who must pay the tax sought to be levied."

The earliest case which is concerned with the exact point raised by the motion to dismiss in this case seems to be

Mix v. *People*, 116 Ill. 265 (1886).

In that case the County of Kankakee filed a bill to foreclose a tax lien on some property in which Mix was interested. Foreclosure suit was begun by special counsel employed by the County and not by the State's Attorney. The defendant contended that the County had not authorized the suit and that the solicitor for the County had, therefore, been unauthorized and the suit was unjustified. In rejecting this point the Supreme Court said in the *Mix* case:

> "Plaintiffs in error sought * * * to question the authority of complainant's counsel to bring this suit. * * * Counsel for defendants in error have presented no authorities on the subject or referred to any suit bearing upon it. We know, of none, except Chapter

14, Sections 5 and 6, concerning the duties of the State's Attorney to prosecute 'all actions and proceedings for the recovery of its revenues, moneys, fees, benefits and forfeitures accruing to the State or his County.' The collection of the public revenue is of the utmost importance and no court should allow a suit of this character to be dismissed because the solicitor may not happen to be the State's Attorney."

Dalby vs. People, 124 Ill. 66, 75.

"As to the right of recovery for all the taxes, section 230 of the revenue law in its first clause provides that the *county board may institute suit* in an action of debt in the name of the people of the state of Illinois for the whole amount due on forfeited property; or any county, city, town, school-district, or othe rmunicipal corporation to which any such tax may be due, may institute suit in an action of debt in its own name for the amount of such tax due any such corporation on forfeited property. The second clause provides that the *county board may also institute suit* in action of debt in the name of the people of the state of Illinois against any person for the recovery of any personal property tax due from such person. Thus it appears that the first clause, with respect to forfeited property, prcvides that the county board *may sue* for the whole amount of the taxes due on forfeited property, or only for the amount due the county; the suit in the former case to be brought by *the county board in the name of the people;* in the latter case, in the name of the county. The second clause respects personal property tax alone, and provides that the county board may also bring suit in the name of the people for the recovery of any personal property tax due from any person. Any personal property tax due from a person, embraced every personal property tax due from the person. Had the intention been to give to the county board the right of recovery only for the personal property tax due the county, we must think the limitation to the tax

due the county would have been expressly named, and the right of action have been given in the name of the county, as was done in the first clause, in providing for recovery by a county of the amount of the tax due the county on forfeited property. We think, under the section last named, the right of recovery here is for all these personal property taxes due from the defendant; and, when recovered, it will be the duty of the county board to distribute them to the several municipal corporations to which they belong, as would have to be done in the case of a recovery by the county board under the first clause of the section of the whole amount of taxes due on forfeited property.

"The judgment will be affirmed."

Attorney General's Opinion.

We have already referred, in the Appellate Court decision in the *Straus* case, *supra,* to an opinion of the Attorney General of the State on the question here under consideration. In Attorney General's Opinions for year 1928, page 239, the State's Attorney of Alexander County addressed an inquiry to the Attorney General, asking the question—

"The County Board of Commissioners would like to know if they have any authority to employ outside assistance in collecting delinquent taxes."

In answering this question in the affirmative, the Attorney General said:

"In answer to your question, allow me to draw your attention to the following cases (citing *Ottawa Gaslight & Coke Company* v. *People,* 138 Ill. 336; *Abbott* v. *County of Adams,* 214 Ill. App. 201; *Stevens* v. *Henry County,* 218 Ill. 468; *Fergus* v. *Russel,* 270 Il.l 304; and continuing): An examination of the cases of *Abbott* v. *County of Adams* (*supra*) and *Stevens* v. *Henry County* (*supra*) and *Fergus* v. *Russel* (*supra*) shows that neither of these cases is the same as *Ottawa Gaslight & Coke Company* v. *People* (*supra*).

Inasmuch as the Supreme Court has not reversed the rule stated in the case of *Ottawa Gaslight Company* (*supra*) it is my opinion that the County Board may employ a competent attorney other than the State's Attorney to represent the People in beginning and prosecuting suits to recover delinquent taxes."

Arbitrary Action Ex Post Facto by the Supreme Court of Illinois.

The Court may observe that the authorities cited in the foregoing opinion of the Attorney General refer to the powers of County Boards generally as provided by the Statutes of Illinois. The County Board of Cook County have, not only these general powers, but also special powers given to it by Act 10, Sec. 7 of the Constitution.

The judgment and opinion by the Supreme Court of Illinois filed on September 23, 1943, now here under review, thereby expressly admits (384 Ill. at page 300) that said judgment order against your petitioner is an arbitrary departure from the established and prior law of the State of Illinois, as announced by the Supreme Court of Illinois. That is an admission that the ruling in this case is *ex post facto* as to the contract and property rights of your petitioner, and that the judgment now under review is a deliberate denial of his constitutional rights stated elsewhere in this petition. That Court said at page 300:

"The statements in those cases which are contrary to the conclusions reached are not adhered to."

Arbitrary Action By State's Attorney.

Every county budget approved by Respondent State's Attorney for 12 years that he has been in office from the year 1933 to the year 1944 inclusive, has provided for the employment of Special Attorneys for the County Board and for various County Officers. This action so approved

by State's Attorney of Cook County, is illustrated by the items from the County Budget of Cook County for the year 1943 which are reproduced below at page 38. It is unconscionable for State's Attorney to contend as he has in this lawsuit, that the County Board has no power to employ Winston, when during the same period and under the same Constitution and Statutes, said State's Attorney has expressly approved such County Budgets. Furthermore, expressly approved such County Budgets and defended this same contract in *Straus* v. *People* as stated above. Furthermore, it is unconscionable and purely autocratic and a wilful attempt to destroy the property rights of Winston without any process of law, when the conclusion of this lawsuit was delayed for ten years after 1934 when the prior ruling was made by the Supreme Court of Illinois before ruling now adverse to Winston, after Respondent State's Attorney has joined in the contention made in the case of *People* v. *Straus,* 266 Ill. App. 95, and 355 Ill. 640, which were sustained to the effect that no parties on that record could object to the validity of the employment of Winston as counsel and attorney for Cook County, with reference to delinquent tax proceedings. This shows a deliberate intention by the State's Attorney, to reap for the County the full advantage and effect of the legal services rendered by Winston for the County, before he would bring forward for decision and conclusion the question as to payment of Winston for legal services to Cook County. We submit that is not only unconstitutional and illegal, but it is plainly immoral. That is so stated and established by many decisions of this Court.

Public importance of this case.

This is not a political case. We present for review a breach of basic civil rights fully as much as the recent

Texas case heard in this Court. This case has as wide and public interest and importance, as had the case of *Brand* v. *Indiana* mentioned above. As shown at pages 36 and 52 of Petition and Tr. 100-137, the County Board continuously and currently ever since the Year 1870 when the Constitution was adopted, has employed and has paid many attorneys for many sorts of legal services entirely outside of the Staff who are permanently employed as full time Assistant State's Attorneys.

Petitioner Winston seeks to recover for private damage caused by infringement upon his franchise to practice law, fully setablished by the Constitution and decision since the year 1870. He urges that the adverse rulings below by the Supreme Court of Illinois, are an arbitrary departure from the meaning and effect of the Statute (Section 13 of Chapter 1 of Ill. Rev. Statutes) and his license and franchise at law, which he has exercised for more than fifty years. And thereby his vested rights are taken away by arbitrary action by Illinois courts.

Not only all Members of the County Board for more than seventy years, but also all such employees for that period, are placed under the cloud of these opinions brought here for review. See Tr. 110.

Furthermore the provisions of Article X, Sec. 7 of the State Constitution are erased altogether, and the future conduct of the County business for more than four million people is directly involved.

Conclusion for Relief.

Your petitioner submits that he did not receive *due process* of law nor *equal protection* of the law, in the Courts of Illinois in this case. The action of Circuit Court and Supreme Court of Illinois was such as to call for review and reversal by the Supreme Court of the United States.

Wherefore, petitioner prays that a rehearing be granted that the order by this Court dated April 24, 1944 be vacated and reversed, and for the allowance of your writ of certiorari to the Supreme Court of Illinois to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein may be reversed, and for such relief as this Court may direct.

WEIGHTSTILL WOODS,
Counsel for Petitioner.

Certificate of Counsel to Petition for Rehearing.

Weightstill Woods states that he is counsel of record for Petitioner E. M. Winston: that the foregoing petition for rehearing has been diligently prepared: and is timely presented in good faith and not for delay.

Respectfully submitted,

WEIGHTSTILL WOODS,
Counsel of Record.

Appendix to Petition for Certiorari.

Cook County Appropriation Bill for Year 1943.

Page	Item		Amount
34	1-134	Outside Special Attorneys—for the purpose of employing special counsel and investigators to handle such legal matters as may be assigned by the President or Members of the Board of Commissioners of Cook County	$ 7,500
53	8-12E	Special work on 1943 personal property Assessment including analysis Federal Income Tax Returns and other items)	$13,410
60	10-134	Outside Special Attorneys	$10,000
63	11-1	One Attorney	$ 4,999
77	19-1	One Sheriff's Attorney	$ 6,499
110	29-1	One Attorney	$ 3,600
133	40-134	Outside Attorneys	$50,000

The foregoing kinds of items appear throughout all budget ordinances for all years. Said items are entirely distinct from and outside the provision made for the State's Attorney's Staff at page 85. That staff includes eighty-odd persons as attorneys. Budget Ordinances are Legislation of which all courts take judicial notice by statute (Chapter 51, Section 48a-b, Ill. Rev. Stats.).

Constitution of Illinois Article 5, Section 24:

"Office and employment defined.

"An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed. An employment is an agency for

a temporary purpose, which ceases when that purpose is accomplished."

Illinois Revised Statutes Chapter 13:

'A license, as provided for herein, shall constitute the person receiving the same, an attorney and counsellor at law, and shall authorize him to appear in all of the courts within this state and there to practice as an attorney and counsellor at law, according to the laws and customs thereof, for and during his good behavior in said practice and to demand and receive fees for any services which he may render as an attorney and counsellor at law in this States." (Section 1.)

Illinois Revised Statutes, Chap. 120, as amended June 28, 1917 (see page 26 above):

'*Suit by county* for tax on forfeited property. Sec. 230. *The county board may, at any time, institute suit in an action of debt in the name of the People of the State of Illinois in any court of competent jurisdiction for the whole amount due for taxes and special assessments on forfeited property;* or *any county,* city, town, school district or other municipal corporation to which any such tax or special assessment may be due, *may, at any time, institute suit in an action of debt in its own name, before any court of competent jurisdiction, for the amount of such tax or special assessment due any such corporation on forfeited property, and prosecute the same to final judgment. The county board* may also at any time, institute suit in an action of debt in the name of the People of the State of Illinois, in any court of competent jurisdiction, against any person, firm or corporation, for the recovery of any personal property tax due from such person, firm or corporation, and in any such suit for the recovery of personal property tax, the return of the county collector that such taxes are delinquent shall be prima facie evidence that such taxes are due and unpaid but the fact that such taxes are due and unpaid